No. 2721

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Frank M. McKey, Trustee in Bankruptcy of the Estate of Tomlinson-Humes, Incorporated, Bankrupt,

Appellant,

vs.

Eli P. Clark and Los Angeles Warehouse Company, a corporation,

Appellees.

BRIEF IN BEHALF OF APPELLEES.

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STATEMENT OF THE CASE.

The statement of the case by appellant in his opening brief is in the main correct, as far as it goes, and such corrections as we wish to make therein can be more conveniently discussed in connection with the various points to be made. We add here, however, the fact that Tomlinson-Humes, incorporated, the bankrupt,

was, prior to its bankruptcy, engaged in the business of dealing in high priced books and valuable works of art, and for that purpose maintained a salesroom in the city of Chicago, Illinois, and had a force of expert salesmen, restorers of pictures, etc., designated as the Art and De Luxe Sales Department. When it became bankrupt, of course, this organization was disrupted and all business stopped.

Appellant says that the pictures in question were offered for sale by the bankrupt to Senator W. A. Clark; but there is no evidence that Senator Clark ever was informed or knew that the bankrupt had anything to do with the pictures. He was informed, however, when the pictures were shown to him and left in his house that they belonged to the defendant E. P. Clark [Tr. p. 90].

The evidence shows that when the contract of March 28th, 1912, was made between Tomlinson-Humes and E. P. Clark, the pictures were still the property of Thomas Myers. Myers was not paid for them until May 11th, 1912, and did not sign the bill of sale of the pictures until that time. Prior to that date the bankrupt had nothing from Myers except a so-called option which could not be found in order to produce it at the trial, but which is said to have contained a power to sell and convey, as well as an option to purchase. However that may be, there is no showing that Tomlinson-Humes had ever attempted to exercise the option to purchase at any time prior to May 11th, 1912. [See testimony of Tomlinson, pages 47-53, 67-70, of the transcript; McArdle, pages 83-85.]

POINTS.

1. The validity of a sale or transfer of personal property is to be determined by the law of the place where the property is situated at the time. If the contract of March 28th, 1912, is a present sale, the place is Illinois; but if the transaction of May 11th, 1912, constitutes the sale, then the place is New York.

2. The agreement between Tomlinson-Humes and Clark of March 28th, 1912, was not fraudulent or void as against the creditors of Tomlinson-Humes, because:

(a) If it was a present sale, it was a sale by Myers to Clark, and hence not in fraud of the creditors of Tomlinson-Humes.

(b) It was not a present sale, but a mere executory agreement for a sale to be consummated in the future.

(c) It was not void by the law of Illinois, where the property was situated at the time.

3. The title of the paintings in question passed from Myers to Clark, in New York, by virtue of the transaction of May 11th, 1912, and the creditors of Tomlinson-Humes are not concerned with that transaction.

4. The transaction of May 11th, 1912, was not fraudulent or void against creditors under the laws of New York, where the property was then situated.

5. The agency of Tomlinson-Humes, incorporated, was not coupled with an interest, and was revoked by its bankruptcy.

6. Tomlinson-Humes, after its bankruptcy, had neither title, possession, nor the right to the possession, of the paintings, and hence no rights in them passed

to the trustee; the bankruptcy court never had the custody or control of them, and Clark might lawfully take possession of them.

I.

The validity of a sale or transfer of personal property is to be determined by the law of the place where the property is situated at the time. If the contract of March 28th, 1912, is a present sale, the place is Illinois; but if the transaction of May 11th, 1912, constitutes the sale, then the place is New York.

There has been some difference of opinion as to the law applicable when a question arises as to the validity of a sale of chattels under such circumstances as are disclosed in the case at bar. But the law is now well settled as we have stated it above.

In the case of *Hervey v. R. I. Locomotive Works,* 93 U. S. 664, 671, the rule is stated as follows:

> "Every state has the right to regulate the transfer of property within its limits, and whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property lawful in that jurisdiction respected in the courts of the state where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and the policy of the latter state conflict with those of the former."

In the case of *Smith v. N. Y. Life Insurance Co.,* 57 Fed 133 (before Judge McKenna, sitting as district judge in the northern district of California), there was

involved the validity of an assignment of a life insurance policy, which was found in California after the death of the insured and sued upon there, although the deceased lived and died in Illinois. Judge McKenna held that the policy was property in California, and that the validity of an assignment of the policy made in Illinois by the deceased to another person living in Illinois, was to be determined by the law of California, and that as the assignment appeared to be in fraud of creditors, it was void under the California law, citing as authority the case of *Green v. Van Buskirk,* 7 Wall. 139.

In the article "Sales," 35 Cyc. page 93, the rule is thus stated:

> "The validity of a transfer of chattels as against creditors and subsequent purchasers, will be determined by the law of the state where the chattels are located."

In the first volume of Wharton on Conflict of Laws, 3rd Ed., Secs. 311a, 311c and 311e, this subject is discussed and the following statement of the rule is made:

> "When the cases above cited are considered together, and those that apparently refer the question to the *lex loci contractus* are considered in the light of the fact that the property involved was at the time of the sale located in the state where the sale was made, they seem to justify the statement that the necessity of a delivery of possession in order to protect the purchaser of personal property against subsequent *bona fide* purchasers from or creditors of the vendor is to be determined, neither by the *lex domicilii* nor *lex loci contractus*

> as such, but by the law of the place where the property is located at the time of the original sale."

The same conclusion is declared in a note to 64 L. R. A. 831.

In note in 11 L. R. A. (N. S.) 1007, upon the same subject, the rule is thus stated:

> "The validity of a sale or mortgage of personal property as affected by the question of fraud against the creditors of the seller, in general, depends on the law of the place where the property is situated at the time of the sale, and not on the law of the place where the contract is made."

In the case of *Schmidt v. Perkins,* 67 Atl. 77, 11 L. R. A. (N. S.) 1007, to which the above note is appended, the Supreme Court of New Jersey held that a transfer of property situated in New Jersey, which transfer was made in Iowa by an Iowa corporation to residents of Iowa, was void as to creditors under the law of New Jersey, and said:

> "The title to tangible personal property is ordinarily governed by the law of its *situs.* The maxim *mobilia personam sequuntur* states a mere fiction of law which it is sometimes necessary to apply in order to do justice, but it ought not to be extended beyond that necessity."

We might produce other authorities along this same line, but the foregoing seems sufficient to show the established rule, and we do not desire to prolong this brief by unnecessary citation of authorities. In view of this rule the law of California, cited by appellant, is entirely immaterial.

II.

The agreement between Tomlinson-Humes and Clark of March 28th, 1912, was not fraudulent or void as against the creditors of Tomlinson-Humes, because

(a) If it was a present sale, it was a sale by Myers to Clark, and hence not in fraud of the creditors of Tomlinson-Humes;

(b) It was not a present sale, but a mere executory agreement for a sale to be consummated in the future;

(c) It is not void by the law of Illinois where the property was situated at the time.

(a) If the contract of March 28th can be construed as a present sale, then the title passing thereby must have passed from Myers to Clark. The agreement between Myers and Tomlinson-Humes, referred to as an option, authorized Tomlinson-Humes to sell and convey the paintings. It therefore had a double aspect, authorizing Tomlinson-Humes to buy the pictures from Myers for certain prices, or to sell them for him. The exercise of the option by the purchase of the pictures would involve the payment of the price, and thereupon a conveyance of the paintings by Myers to the party so exercising the option. This had not been done on March 28th. The exact terms of the option are not before the court, but the use of the word "option" imports some agreement by which title would not pass until the option had been exercised and the price paid. If there was anything more in this option the burden was upon the appellant, as the plaintiff, to establish it. In its other aspect the so-called option was really an agreement of agency. It constituted Tomlinson-Humes the agents of Myers to sell and

convey the paintings. Anything done by them for that purpose was done as agents of Myers. They could not sell and convey otherwise than in Myers' behalf, for as agents they had no title, and they had acquired none under the option. Their possession of the paintings was not in their own right, and was in law the possession of Myers. Hence, if any title passed by the contract of March 28th, it necessarily passed from Myers, and the sale was necessarily a sale made by Myers through Tomlinson-Humes as his agents to Clark. The fact that the contract was not made in the name of Myers, but purported to be the contract of Tomlinson-Humes, does not affect this conclusion. An agent may act in his own name, and his acts, if done within the scope of his authority, are binding on his principal.

31 Cyc. 1416;
Salmon Falls Mfg. Co. v. Goddard, 14 Howard 446;
S. P. Railway Co. v. Von Schmidt, 118 Cal. 318.

Such a transaction, constituting a sale from Myers to Clark, could be attacked only by the creditors of Myers, under the law either of California or Illinois. This is apparent from the language of Sec. 3440 of the Civil Code of California quoted by appellant. When that section speaks of the seller having possession or control of property, it means, of course, possession or control in his own right as owner and not mere possession as agent, which is deemed in law the possession of the principal. The statement of Illinois law quoted from *Dooley v. Pease,* 180 U. S. 126, is equally clear on this point.

It has been held that by the law of California, a sale under the circumstances appearing here would not be void even against the creditors of Myers. *Williams v. Lerch,* 56 Cal. 330. The plaintiff, however, represents only the creditors of Tomlinson-Humes, and as the transaction, if amounting to a present transfer, was not a transfer made by Tomlinson-Humes, the plaintiff has no concern with it and cannot attack it.

(b) The agreement in question is set forth in full at pages 53 to 62 of the transcript. Appellant claims that it constitutes a bill of sale transferring title to the property and quotes a statement of the witness Thurber that "We then went to the coast, to Los Angeles, and sold them to Mr. E. P. Clark." This statement of Thurber may be of some value as a narrative of events, but the court is not bound by his construction of the contract as being a present sale, even if he meant to express such an opinion, which is doubtful. In construing the contract the court must consider its language and also the surrounding circumstances and the conduct of the parties under it. This contract purported to be made by Tomlinson-Humes and E. P. Clark as the only parties to it, and appellant quotes some language from it which is in the present tense, as if a present sale passing the title from Tomlinson-Humes to Clark were contemplated. But this language is not conclusive of the matter.

> "While certain terms and expressions standing alone import an executed or executory contract, they are by no means conclusive, but must be construed with reference to other provisions of the contract and according to what appears to have

> been the real intention of the parties, and so a mere recital in the writing evidencing the contract that the article is 'sold' or that the buyer has 'purchased' it does not necessarily make the contract executed."
>
> 35 Cyc. 276.

The fact is that at the time this contract was made the paintings belonged to Myers, and Tomlinson-Humes had no title to them. It is evident, therefore, that viewing the contract as one solely between Tomlinson-Humes and Clark, no title could pass by it, and this fact must have been known to the parties; for, as appellant says, the option is referred to in the contract and must have been before the parties. Why should they have intended the impossible?

In addition to the language quoted by appellant from the contract, it also contains this significant statement: "Whereas first party now has an option on fourteen (14) certain paintings from Thomas Myers, of Buffalo, N. Y., and second party hereby agrees to purchase same from first party" [Tr. pp. 53-54]. This language is exactly adapted to express the idea of an executory contract to be carried out later.

The contract is undoubtedly a peculiar one. It explains for itself in great detail why it is that Clark "hereby purchases" the paintings and "herewith makes payment" for them, the explanation being that Tomlinson-Humes have discovered the paintings and brought the options to the attention of Clark and should be compensated therefor, and that they are to go to large expense in preparing a campaign for resale of the paintings and preparing the paintings for resale. The

contract also recites that Clark allows Tomlinson-Humes to make the profit represented by the difference between the price paid by Clark and "the price which they have to pay to Mr. Myers," thus indicating clearly that they were to pay Myers out of the funds provided by Clark.

Looking at this contract as a whole in view of the circumstances and situation of the parties the proper construction of it is that there was to be a transfer of title as soon as it could be had from Myers, and that Clark paid his money in advance because Tomlinson-Humes would have to use it to pay Myers for the paintings and thus get the title, and because Tomlinson-Humes had already rendered services to Clark which he deemed worthy of compensation in discovering the paintings and bringing the option to his attention.

Considering only the language of the contract of March 28th, 1912, the most that could be said in behalf of the plaintiff on the point now under consideration is that the contract is ambiguous, some portions of it looking toward a present transfer and some looking toward a future transfer of title. Under such conditions the following rule of construction has been adopted:

> "Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions. And the subsequent acts of the parties, showing the construction they have put upon the agreement themselves, are to be looked

to by the court, and in some cases may be controlling."

9 Cyc. 588;

Lowrey v. Hawaii, 206 U. S. 206, 222;

Pine River etc. Co. v. U. S., 186 U. S. 279, 290.

"In determining the meaning of an indefinite or ambiguous contract, the construction placed upon the contract by the parties themselves is to be considered by the court. It has been said that in order to render applicable the rule that contemporary construction of a contract by acts of the parties is entitled to great weight, it should appear with reasonable certainty that they were acts of both parties, done with knowledge and in view of a purpose at least consistent with that to which they are sought to be applied. In such a case the practical interpretation by the parties themselves is entitled to great, if not controlling, influence, in ascertaining their understanding of its terms. In fact, where from the terms of the contract, or the language employed, a question of doubtful construction arises, and it appears that the parties themselves have practically interpreted their contract, the courts will generally follow that practical construction."

6 R. C. L., pages 852-3.

2 Wharton on Contracts, Sec. 653, is to the same effect.

Turning now to the acts of the parties under the contract in question, we find that they undoubtedly supposed that the title to the paintings would pass by some subsequent transaction in which Myers should participate. No sooner was the contract made than

Humes, who acted for Tomlinson-Humes in making it, returned to Chicago [Tr. p. 72], and on April 10th, 1912, wrote Clark a letter from Chicago, in which he said:

"Inasmuch as it will take us several days to make our financial arrangements to pay Mr. Myers, it rendered it convenient for all parties to await Mr. Bennett's pleasure, and Mr. Bennett and I purpose going to Buffalo next week. I shall take our attorney with us to see that the transfer of title is properly made, and we will use every precaution to fully protect your interests in the matter and see that you get a clear and perfect title to the paintings." [Tr. p. 64.]

On May 3rd, 1912, Humes again wrote Clark from Chicago, saying:

"We have obtained sufficient money on your paper to pay Mr. Myers * * * We are leaving tonight for the east to make payment to Mr. Myers. We will have the transfer of the pictures made in a manner which will satisfy both Mr. Bennett and our attorney." [Tr. p. 66.]

Humes and Tomlinson before going to Buffalo told Mr. Bennett, who was Clark's agent and representative in the matter, that their attorney, Mr. McArdle, "was going along; that there were some matters regarding the title of the paintings that we wanted Mr. McArdle to look into, and as soon as he was satisfied that everything was all right and we were in shape to close the deal, we would wire Mr. Bennett that he should come up." [Testimony of Tomlinson, Tr. p. 67.] They also told Bennett that they were arranging for the negotiation of some notes with which to raise the money

necessary to purchase these paintings from Mr. Myers. [Bennett: Tr. p. 77.]

Before going to Buffalo, Humes told McArdle that he was going to Buffalo to complete the Clark contract; that by that contract Tomlinson-Humes were entitled to any reduction in price they could get from Myers, and therefore they did not want a transfer of title direct from Myers to Clark. McArdle told Humes that the way to do this was to have two bills of sale made, one from Myers to Tomlinson-Humes, and one from Tomlinson-Humes to Clark. [Testimony of McArdle: Tr. pp. 81-83.]

Evidently Tomlinson and Humes did not get away quite so soon as Humes had expected, but they arrived in Buffalo on May 10th, 1912, having with them, as Tomlinson said, a part of the money raised on the Clark notes. On May 11th, 1912, the deal was closed with a great deal of formality. Tomlinson and Humes first met Mr. Myers at his attorney's office and arranged the price that Myers was to receive for the paintings and drew up a number of documents for use in the transfer; then they went to the hotel where the paintings were situated. Tomlinson-Humes handed over the price of the paintings to Myers and received his bill of sale and the other papers in connection with the matter; then they went into the room where the paintings were, taking Mr. Bennett and Mr. Myers with them, and Mr. Myers went around to each one of the paintings and pointed it out and identified it to Bennett and gave a brief description of it; then the bill of sale from Tomlinson-Humes to Clark was added to the other papers, and the papers were all handed to

Bennett and he was formally told that the paintings were his and for him to take possession. [See testimony of Tomlinson: Tr. pp. 47-52, 69-70; Bennett: pp. 77-79; McArdle: Tr. pp. 83-85.]

After the deal was closed on May 14th, 1912, Humes wrote Clark a letter from Buffalo, telling in detail how on Saturday "we made the transfer of the pictures from Mr. Myers to us and from us to you." [Tr. p. 68.]

In view of the foregoing facts there is no possible chance for a doubt that the parties to the contract of March 28th, 1912, thought that some further and more formal act was necessary to convey the title of the paintings to Clark, and they acted on this belief in a very positive way and placed a construction upon the contract which the court should be slow to overturn.

Even if the agreement of March 28th were intended by the parties as a present transfer and bill of sale from Tomlinson-Humes to Clark, it could not have that effect for the reason above pointed out that Tomlinson-Humes had no title to transfer. Under such circumstances the agreement could not be anything more than a mere executory agreement, which would take effect as a present sale only at such future time as the title might be acquired by Tomlinson-Humes.

Benjamin on Sales, 6th Am. Ed., pp. 80-84;
Smith on Personal Property, p. 137;
Mechem on Sales, Sec. 202;
Maskelinski v. Wazsinenski, 20 N. Y. Sup. 533.

"As a rule there can be no sale; that is, there can be no transfer of the property in the goods, unless they are owned by the seller."

35 Cyc. 47.

"Where the seller has no title at the time of the sale, but subsequently acquires title, the title so acquired inures to the benefit of the buyer."

35 Cyc. 161.

"A contract of sale is necessarily executory, if at the time of the contract the property is not in existence, or has not been acquired by the seller, although it has been held that if the property has a potential existence the sale is not invalid, and that the property will vest in the buyer upon its coming into existence, or upon its acquisition by the seller."

35 Cyc. 276.

The laws of California and Illinois referred to by appellant do not apply to mere executory agreements of sale, but are limited by their terms to such agreements as operate to pass the title of the property affected. An agreement for a future sale is perfectly valid so far as creditors of the prospective seller are concerned without a change of possession. Of course if such agreement is not carried out by a transfer of title before the rights of creditors have attached, questions may arise as to how far it will be effective against them. But such agreement is in no way denounced as void by the statutes and laws in question. If the agreement is executed by a subsequent transfer, the rights of creditors depend upon the validity of that transfer. Such is the present case. If creditors of

Tomlinson-Humes have any rights in these paintings, they must be worked out under the transaction of May 11th, 1912; but, as we expect to show later, they have no such rights under that transaction.

(c) The agreement of March 28th is not void under the laws of Illinois. Appellant relies for a statement of that law upon a quotation from one decision of the United States Supreme Court, which was there concerned with only one phase of the matter. For further details we must resort to the statutes of Illinois and the decisions of the Illinois courts. There is no statute in Illinois like that of California declaring all sales made without change of possession to be conclusively fraudulent. As far as the statute is concerned the question is one of actual intent in every case. (See Sec. 4, Chap. 59, Illinois Rev. St. in Hurd's Rev. St. 1905, p. 1196.)

Section 5 of the same statute provides that Sec. 4 shall not affect the title of a purchaser for a valuable consideration, unless it appears that he had notice of the fraudulent intent of his immediate grantor. In this case there is no evidence of actual fraudulent intent on the part of Tomlinson-Humes or of any notice thereof on the part of Clark. There is no question that Clark paid an ample consideration for the transfer. It should therefore be regarded as valid under the statute above referred to.

However, notwithstanding the above statute, the courts of Illinois have declared a rule very much like that established by the statute of California. They have, however, made an exception to the rule as ap-

pears from the following quotation from the case of *Thompson v. Yeck*, 21 Ill. 73:

> "All conveyances of goods and chattels when the possession is permitted to remain with the donor or vendor, is fraudulent of itself and void as to creditors and purchasers, unless the conveyance itself stipulates for such retaining possession by the vendor or donor."

The exception made by this case is also stated and declared in the following cases:

Rozier v. Williams, 92 Ill. 187;
Bass v. Pease, 79 Ill. App. 308-313;
Lowe v. Matson, 140 Ill. 108.

Furthermore, by the laws of Illinois a delivery made subsequent to the transfer is sufficient if made before the rights of creditors attach. This is different from the California law where a subsequent delivery will not cure the difficulty.

Cruikshank v. Coggswell, 26 Ill. 366;
Frost v. Woodruff, 54 Ill. 155;
Huschle v. Morris, 131 Ill. 593.

Nor does the fact that the property, after being delivered to the purchaser, is subsequently returned to the seller, render the sale conclusively fraudulent and void. It is only a fact to be considered on the question of fraudulent intent and may be explained.

Brown v. Riley, 22 Ill. 46-51;
Wright v. Grover, 27 Ill. 426.

Applying these rules to the present case, we see that the contract of March 28th expressly provides that

the paintings shall be left in the possession of Tomlinson-Humes to sell as agents of Clark, hence the retention of possession by Tomlinson-Humes is consistent with the deed and the transfer is not void under the Illinois law. Again, the property was later delivered to Clark's agent, Bennett, at Buffalo, and was held by him for a time, and its subsequent return to Tomlinson-Humes, while it may be evidence of a fraudulent intent, does not in this case establish it. All the facts of the case show clearly that there was no fraud in fact, but this matter we will discuss later in connection with the New York law. Appellant claims this delivery to Bennett was fictitious, but this is not so. His possession was not of long duration, but it was real while it lasted. He had the room in the hotel, where they were, assigned to him, and arranged to store the paintings in the hotel vault that night. Although Tomlinson-Humes signed the receipt for the pictures on the day they were delivered to Bennett, he did not in fact re-deliver them until the next morning. [Testimony of Bennett: Tr. pp. 78-9; McArdle: Tr. p. 85; Tomlinson: Tr. pp. 52, 70-1.]

III.

The title of the paintings in question passed from Myers to Clark, in New York, by virtue of the transaction of May 11th, 1912, and the creditors of Tomlinson-Humes are not concerned with that transaction.

Although two bills of sale were passed at Buffalo, N. Y., by which the title apparently passed from Myers through Tomlinson-Humes to Clark, that fact is not conclusive as to the true character of the transaction.

The facts show that Tomlinson-Humes were a mere conduit. By the agreement of March 28th they had bound themselves to acquire for Clark the title of Myers, had received Clark's money for that purpose, and had made themselves his agents to deal with the paintings. That agreement was in effect an equitable assignment to Clark of the option held by Tomlinson-Humes. They could not acquire any title for their own benefit or in their own right from Myers, because they were Clark's agents and had bound themselves to have the title transferred to him, and hence any attempt on their part to deal with the title on their own account would be a fraud upon Clark. The parties clearly recognized the existence of this fiduciary relation between Tomlinson-Humes and Clark when they provided in the contract that Tomlinson-Humes could have the benefit of any reduction they could get from the option price. They knew that in the absence of such provision such a discount would go to Clark. The only reason for making the two bills of sale, which appear to carry the title through Tomlinson-Humes, was that they might obtain this discount. They seemed to fear that if the purchaser's name were disclosed, they might have trouble with Myers about the discount. [See testimony of McArdle: Tr. p. 82.] Under these circumstances the title never vested in Tomlinson-Humes at all. They were a mere conduit and their creditors could have no rights in the property.

> "Whenever one is a mere conduit, as where he purchases property in his name as the agent of another, with the latter's funds, and subsequently

conveys to him, there is no interest to which a judgment lien can attach."

Freeman on Judgments, Sec. 373.

A similar situation was disclosed in the case of *Zenda Mining & Milling Co. v. Tiffin,* 11 Cal. App. 62. In that case one Parlow entered into an agreement to sell and convey certain mining property to Cummings, and at the same time signed and acknowledged two deeds conveying the property to Cummings. On the same day Cummings entered into a contract with Bryson and others, which was in effect an assignment to Bryson of the contract secured from Parlow, Bryson agreeing to perform the covenants made by Cummings in that contract. As a part of the same transaction Cummings signed and acknowledged two deeds conveying the property to Bryson. Bryson paid to Parlow the cash payment under the contract and thereupon all the papers were deposited in escrow to be delivered to Bryson if he performed the conditions of the contracts. Bryson entered into possession, complied with the contract and received the papers, including the deeds, in March, 1904, and thereafter conveyed the property to plaintiff. The defendant had obtained a judgment against Cummings intermediate between the date of the contract and the date when Bryson received delivery of the respective deeds, and claimed that his judgment became a lien upon the property on the recording of the deed to Cummings. The court held, however, that the lien of the judgment did not attach to the property in Cummings' hands, saying:

"It may be admitted that delivery of the deeds conveyed to Cummings an apparent interest in

> the property, but it was nothing more than a naked legal title. Assuming that his interest, if any, acquired under the Parlow contract, did not pass to Bryson and associates on September 8th, prior to docketing of the judgment; nevertheless, they, Bryson *et al.,* paid the entire purchase price and the doctrine is well established that where land is purchased in the name of one person and the consideration is paid by another, the land will be held by the grantee in trust for the person furnishing the consideration. Whenever one is a mere conduit, as where he purchases property in his name as the agent of another with the latter's funds and subsequently conveys to him, there is no interest to which a judgment lien can attach."

The above case related to real property, but that cannot afford any ground for distinction favorable to appellant. The rules regarding transfer of property and formalities required therefor are stricter in the case of real estate than in the case of personal property, hence the principle declared in the above case should be applied even more strongly to personalty than to realty.

IV.

The transaction of May 11th, 1912, was not fraudulent or void against creditors under the laws of New York, where the property was then situated.

By the laws of New York no conclusive presumption of fraud against creditors arises from the fact that there is no change of possession of property sold. The New York statute regulating this matter is the Personal Property Law of 1909, which is substantially a

re-enactment of other statutes which were in effect at least as early as 1830. Section 36 of that statute provides in substance that a sale made without change of possession is presumed to be fraudulent against creditors, "and is conclusive evidence of such fraud unless it appear, on the part of the person claiming under the sale or assignment, that it was made in good faith, and without intent to defraud such creditors or purchasers." (See Wadham's Cons. Laws of New York, Vol. 4, p. 3026; Birdseye Cumming & Gilbert's Cons. Laws, Vol. 4, p. 4206.) Section 37 of the same statute provides that in such cases the question of the existence of a fraudulent intent is a question of fact and not of law. (Wadham, Vol. 4, p. 3026; Birdseye C. & G., Vol. 4, p. 4208.)

Construing this statute and its predecessors, the courts of New York have held that one claiming title to personal property under a sale unaccompanied by delivery and change of possession is not required by the statute of frauds as against the creditors of the vendor to show a valid excuse for leaving the property in the vendor's possession, but it is sufficient if he shows that the sale was made in good faith and without any intent to defraud creditors or subsequent purchasers.

Hanford v. Artcher, 4 Hill 271;
Mitchell v. West, 55 N. Y. 107.

It is also permissible in New York for the buyer to employ the seller to dispose of the property for him, provided it is done in good faith without intent to defraud creditors.

Preston v. Southwick, 115 N. Y. 139-151.

The buyer may also leave the property with the seller for the purpose of having him complete the manufacture of it. The fact that this was the reason for leaving the goods with the seller was held to be sufficient to rebut the statutory presumption.

Prentiss Tool etc. Co. v. Schirmer, 136 N. Y. 305-311.

The convenience of the seller (Bissell v. Hopkins, 3 Cow. 166-188), and the difficulty of making delivery (Clute v. Fitch, 25 Barb. 428), have been held sufficient reasons for leaving the property with the seller in New York.

Section 40 of the above mentioned Personal Property Law of 1909 provides that the statute does not affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appear that he had previous notice of the fraudulent intent of his immediate vendor. (Wadham, Vol. 4, p. 3027; Birdseye C. & G., Vol. 4, p. 4209.)

Acting on this section, the New York courts have held that a fraudulent intent on the part of the seller only, unknown to the buyer, where a consideration is paid, does not render the transaction void.

Leach v. Flack, 31 Hun. 605;
Parker v. Conner, 93 N. Y. 118;
Zodler v. Riley, 100 N. Y. 102;
Commercial Bank v. Sherwood, 162 N. Y. 310-321.

In the above cited case of *Zodler v. Riley,* it was held that one who gives his promissory notes in pay-

ment for personal property and afterwards pays one or more of the notes, is a purchaser for value.

In the case at bar there can be no question as to the entire good faith of the transaction, and appellant does not appear to question it. No evidence of any fraudulent intent was offered and the defendant Clark took the stand and denied that he either had or knew of any such intent, and stated that he had paid the notes given for the paintings. [Tr. pp. 95-96.] But even if he had not taken the stand, the whole transaction shows for itself that there was no intention to defraud the creditors of Tomlinson-Humes. There could have been no such intention, for Tomlinson-Humes did not own the pictures and acquired no title thereto by any of the steps which were taken, as we have already pointed out. Clark bought these pictures to resell at a profit. What would be more natural than that he should employ Tomlinson-Humes, who were dealers in paintings and works of art, to re-sell them for him?

Of course, to sell these paintings they must have possession of them in order to be able to exhibit them to prospective purchasers. Clark gave Tomlinson-Humes his notes for $125,000.00 in advance of receiving title to the paintings, so that they might be able to pay their expenses as they went along.

It is too clear for argument that the transaction was made in perfect good faith and is valid under the laws of New York, which as we have already shown must cover the matter.

We have referred to the laws of New York and

Illinois without proof, because the federal courts take judicial notice of the laws of all states in a case commenced in the federal courts.

Owings v. Hull, 9 Peters 607;
Hanley v. O'Donoghue, 116 U. S. 1, 6;
4th Nat'l Bk. v. Franklyn, 120 U. S. 751.

V.

The agency of Tomlinson-Humes, Incorporated, was not coupled with an interest and was revoked by its bankruptcy.

Appellant asserts that under the contract of March 28th, 1912, Tomlinson-Humes had an authority coupled with an interest. Consideration of this proposition involves an examination of the contract. As we have already said, it contemplated that the title of Myers to the paintings should be acquired and vested in Clark. This could be done at any time under the Myers option contract, and in contemplation of its accomplishment, the contract of March 28th goes on to provide that Clark "engages the services" of Tomlinson-Humes to resell the paintings for him, and employs Tomlinson-Humes "as his agents and brokers," and Tomlinson-Humes "accepts this employment and agrees to serve" Clark "as brokers and agents in the sale and disposition of said paintings." Clark is to have "the expert services" of Tomlinson-Humes and their organization for the resale of these paintings. Tomlinson-Humes is to have "the exclusive right and interest in all of said paintings, to sell and dispose of said paintings and each of them." There are detailed provisions as to the prices for which the paintings may

be sold and as to the manner in which Clark may terminate the agency in advance of the stipulated time. Tomlinson-Humes are to clean and restore the paintings and reframe them, if necessary, and to "use their best efforts" to resell the paintings, and are to keep them insured. They are to pay all expenses of any kind whatever which they may incur in connection with the paintings. As compensation they are to receive 50 per cent of the profits which Clark may make on the sale of the paintings, or certain stipulated sums which he may pay them to terminate the agency. There is nothing in the contract purporting or intended to give Tomlinson-Humes any interest in the paintings themselves. Their interest is only in the profits to be derived from a sale. If they fail to make a sale within the time limited, Clark may withdraw the paintings from sale without payment of any sum whatever, and they have no further rights in the matter. The provision that Tomlinson-Humes are to have the exclusive right and interest to sell, etc., does not give them an interest in the paintings nor make the power one coupled with an interest.

In the case of *Taylor v. Burns,* 203 U. S. 120, it was held that an interest in the property upon which the power is to operate, and not merely an interest in the exercise of the power, is essential to make a power of attorney one coupled with an interest so as not to be subject to revocation. In that case Burns gave Taylor a power of attorney in which it was stated that Burns "sells to the said party of the second part the said mining claims upon the terms and consideration follow-

ing." It was also provided that Taylor was to sell or negotiate the sale of these mines and was to receive as commission a portion of the excess over a certain limited price. Notwithstanding the use in the contract of the language quoted, the court held that the instrument was a mere power of attorney to sell; that the power was not coupled with an interest and was revocable.

That case appears to be decisive of the present on the point, but there are numerous other cases to the same effect.

Where the agent is authorized to sell property and receive as compensation a part of the proceeds or profits of the sale, his agency is not coupled with an interest and the power is revocable.

McMahon v. Burns, 216 Pa. St. 448, 65 Atl 806;

Schilling v. Moore (Okla.), 125 Pac. 487;

Fisher v. So. L. & T. Co., 138 N. C. 90, 50 S. E. 592;

Hall v. Gambrill, 92 Fed. 32.

In the case of *Farmers Loan & Trust Co. v. Wilson*, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696, it was held that where an agent collects rents on commission his power is not coupled with an interest; that the interest must be an interest in the thing itself and the power must be ingrafted upon some estate or interest in the thing to which it relates, in order that the power may be coupled with an interest.

In the case of *Barr v. Schroeder,* 32 Cal. 609-617, it was held that a power is not coupled with an interest

unless the agent has an interest in the property upon which the power is to be exercised, and not merely an interest in the money to be derived from the exercise of the power.

To the same effect are the cases of

Brown v. Pforr, 38 Cal. 556;
Flannagan v. Brown, 70 Cal. 259;
Frink v. Roe, 70 Cal. 310.

Under the rule established by the foregoing authorities the power of Tomlinson-Humes in this case was clearly not coupled with an interest. Furthermore, their contract with Clark was not of an assignable character, for it involved the performance of personal services by Tomlinson-Humes and a relation of personal trust and confidence clearly existed between them and Clark. The contract provides that Clark "engages their services" and is to have their "expert services" to sell the paintings and that they will exercise their best efforts to make sales. Moreover, Clark entrusts to their care property for which he has paid $125,000.00, and authorizes them to sell and convey it and to collect the price, which is to be not less than $480,000.00. It is very clear that the personal element entered into the contract, and that Clark would not have made it if he had thought that it was assignable or that some one else could step into the shoes of Tomlinson-Humes and claim the right to perform it. Appellant in discussing this matter claims that the only element of personal skill involved is the retouching of the paintings and that that was done prior to the bankruptcy. But this claim as to the character of the con-

tract is erroneous. The element of personal choice necessarily entered into every one of the stipulations above referred to. It cannot be otherwise in an agreement where one of the parties engages the expert services of the other to sell works of art costing $125,000.00, entrusts their possession to that other party, and authorizes him to collect the price when they are sold.

> "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised by him in whom he actually confided."
>
> Ark. etc. Co. v. Belden Mining Co., 127 U. S. 379, 388.

This case involved a contract by defendant to furnish ore in certain amounts and of certain quality, and under certain conditions and terms, to be assayed by the other party, and paid for according to the result of this operation, and it was held that the assignee of the other party could not compel the defendant to recognize him or to do business under the agreement.

Approved in

> Delaware Co. v. Diebold Safe Co., 133 U. S. 473, 488;
>
> Burck v. Taylor, 152 U. S. 634, 651.

> "An office involving fiduciary duties or an agency in which the *delectus personae* is the essence of the relation, is not the subject of a sale or assignment."
>
> Colton v. Raymond, 114 Fed. 869.

"The contracts involving the relation of personal confidence and such that the party whose agreement conferred those rights, must have intended them to be exercised only by him in whom he actually confided, are not transferable."

4 Cyc. 22.

"There are many property rights which are by the terms of their creation expressly or impliedly restricted to the person originally acquiring them, or which are by an express provision made non-assignable without the consent of the other party to their creation. The question of whether such rights are assignable must depend upon their nature and upon the terms of the contract upon which they are founded. If the contract calls for the exercise of personal skill or discretion, it is inalienable, and would therefore not pass to the trustee in bankruptcy."

5 Cyc. 351.

The contract of Tomlinson-Humes herein referred to, not being of an assignable character, did not pass to appellant as their trustee in bankruptcy. In discussing this matter appellant cites Sec. 653 of Remington on Bankruptcy to the point that contract rights are not impaired by the bankruptcy and the trustee may assume a contract relation of the bankrupt. This was merely a statement of the general rule in cases not affected by the principle we are now considering. But the rule in such cases as we have here is stated by Remington at Sec. 994 of the 2nd Ed. as follows:

"Uncompleted contracts for personal services or for the exercise of skill wherein trust and confidence are reposed or reliance had on skill, do not pass."

In the case of *In re McBride,* 132 Fed. 285, the District Court for the Southern District of New York held that a contract between an author and a publisher, a corporation, whereby the latter was to publish a series of works of the author, revise them as necessary, keep a supply on hand and properly advertise the works and diligently enter upon their sale throughout the country, was not assignable and did not pass to the trustee, for the reason that it involved a personal trust and confidence, notwithstanding that the publisher was a corporation.

Appellant also cites in this connection the California case of *Janin v. Browne.* That case involved quite a different state of facts. There the contract of Browne was in substance that he would guarantee to Janin a certain price for his house, which was to be built under Browne's supervision, and there was no power given Browne to convey the property or receive the proceeds of the sale; neither was there anything apparent in the contract indicating that Browne had a special skill in the selling of houses, or that there was any special reason for the sale to be made by him. Under these circumstances after the house was built it would make little difference who made the sale. The action was brought to enforce Browne's guarantee, so that the plaintiff had waived whatever right he might have to object to the performance of the contract by the administrator.

In the case of *Husheon v. Kelly,* 162 Cal. 656, also cited by appellant, it is said that the rule that contracts to perform personal acts are discharged by the

death or disability of the person who was to perform the acts does not appiy where the services are of such a character that they may be as well performed by others. But this case did not involve the question of agency, and the statement itself was a mere passing remark, and does not in any event cover such a case as the present.

Both of those cases involved the question of revocation or termination of a contract by death of the part and not by his bankruptcy. There is good reason for a difference in the two cases, especially when financial responsibility is in question. After the death of a party his estate may be in sound financial condition, but in case of bankruptcy the trustee necessarily has an insufficiency of assets to meet the liability.

The rule is well established as to the effect of bankruptcy on the authority of an agent. It is revoked by the bankruptcy, especially in such cases as this where his pecuniary responsibility is important.

> "The bankruptcy of a business agent, as for example an agent appointed to sell merchandise, or to receive payment for money due his principal, operates as a revocation of his authority."
>
> Mechem on Agency, Sec. 267.

> "When one appoints another to act as agent, it is generally presumed, especially in cases where the handling of funds or property is necessary, that he appoints a certain one because he believes the latter responsible for any loss or damage sustained by his misconduct or neglect of duty. For this reason it is a general rule of law that an

agent's authority is usually terminated by his bankruptcy."

1 Clark & Skyles on Agency, Sec. 190, p. 450.

"When the agency is such as to render the agent's solvency necessary to the due and faithful performance of the act, as where he is authorized to receive the principal's money, or to sell his property, the authority will generally be terminated by the agent's bankruptcy."

Reinhard on Agency,, Sec. 178.

"The insolvency of the agent will ordinarily put an end to the agency, at least if it is in any way connected with the agent's business which has caused his failure."

31 Cyc. 1312.

"The bankruptcy of the agent revokes his authority except where the act to be performed by the agent is merely formal."

1 Enc. of Law, 2nd Ed. 1227.

In the case of *Audenried v. Betteley,* 8 Allen (Mass.) 302-308, a contract was involved by which the plaintiff engaged one H. to sell coal and wood for the plaintiff on commission, the coal and wood to be shipped by the plaintiff to H. and remain in his possession until sold. H. became insolvent and made an assignment of all his property in insolvency to the defendants. It was held that H. was the agent or factor of the plaintiff; that his agency was terminated by his insolvency and that the defendants had no right to the property remaining on hand or to the accounts payable for such part of the property as had previously

been sold, unless the agent had some unsatisfied claim against the principal for which as a factor he would have a lien on the property.

In the case of *Cushman v. Snow,* 186 Mass. 169-174, the plaintiffs, who were manufacturers of woolen goods, engaged the defendants as their factors to sell plaintiffs' manufactures upon commission and collect the proceeds. This arrangement continued for some time, defendants making the sales in their own names, and thereafter defendants became insolvent. It was held that the insolvency of the factors terminated their agency and that the assignee in insolvency having collected accounts for plaintiffs' goods sold, the plaintiffs could recover the amount thereof from him.

In this case, therefore, as soon as Tomlinson-Humes became bankrupt, their authority and power to act for Clark in the matter of selling these pictures terminated. This necessarily terminated their right of possession, which was merely incidental to the power of sale. This occurred at least as early as the filing of the petition in bankruptcy against them. As their power terminated and their contract was not assignable and did not pass to the trustee in bankruptcy, the trustee therefore has no claim against or concern with the pictures. He could not in this case, as was suggested in the case of Audenried v. Betteley, assert any claim against the pictures for expenses incurred in connection with them, because the contract itself squarely states that all of these expenses are to be discharged by Tomlinson-Humes.

VI.

Tomlinson-Humes, after their bankruptcy, had neither title, possession nor the right to the possession of the paintings, and hence no rights in them passed to the trustee. The bankruptcy court never had the custody and control of them and Clark might lawfully take possession of them.

Appellant criticises the trial court for having based its decision upon the case of York Manufacturing Co. v. Cassell, 201 U. S. 344, which held that the trustee stands simply in the shoes of the bankrupt and has no greater right than the bankrupt. Appellant bases this criticism upon the amendment of 1910 to Sec. 47 (a) of the Bankruptcy Act, by which the trustee has all the rights of a creditor armed with process and can enforce any claim which a creditor could have asserted at the date of filing the petition, had such creditor been holding an execution levy on the property, if in the custody of the court, or had an execution returned unsatisfied, if the property is not in the custody of the court. The distinction claimed by appellant to exist depends on the correctness of his further argument that the transfer, which he says was made by Tomlinson-Humes to Clark of these paintings, was void against the creditors of Tomlinson-Humes. That argument we have already answered, and we believe we have shown that Tomlinson-Humes' creditors had no rights at all in the property by virtue of the transaction between Tomlinson-Humes and Clark. It is not claimed that they have any rights arising from any other source. Such claim could not well be made, for of course the mere possession of property by an

agent for the purpose of sale gives his creditors no rights against it, nor can the creditors of Tomlinson-Humes assert or enforce any rights against the property of Clark, in the absence of some dealing with the property which the law regards as fraudulent against them.

In the absence of rights which can be enforced by creditors, the amendments of 1910 do not affect the matter and the doctrine of York Manufacturing Co. v. Cassell is still controlling. Therefore since Tomlinson-Humes by their bankruptcy lost all rights in the paintings, it necessarily follows that the trustees acquired none. The law on this subject is stated in the 2nd edition of Remington on Bankruptcy as follows:

> "The subject of the trustee's rights and title to assets is three-fold; the trustee succeeds to the bankrupt's title and stands in his shoes and has the bankrupt's rights and remedies; and he also takes the property, in cases unaffected by any fraud of the bankrupt towards creditors, in the same plight and condition in which the bankrupt held it and subject to all equities and rights imposed upon it in the hands of the bankrupt, except where there has been some transfer or incumbrance of the property or seizure of it by legal process, void as against the trustees by some positive provision of the Bankrupt Act, although, as to property coming into the custody of the bankruptcy court, he takes it in such plight and condition only to the extent that some creditor would have taken it had such creditor held a lien by legal or equitable proceedings thereon and, as to

such property not in the possession of the bankruptcy court, held an unsatisfied execution."

Sec. 1137.

"Thus if no circumstances existed that would have entitled a creditor, under the state law, to avoid the contract of the bankrupt, or the lien upon his property, and if there was no preference nor lien obtained by legal proceedings within the four months preceding the bankruptcy and while the bankrupt was insolvent, then the trustee is bound and bound solely by the bankrupt's contracts and transfers."

Sec. 1143.

"That a trustee in bankruptcy occupies no better position than the bankrupt, except as to those matters especially excepted by the Bankruptcy Act, is well settled."

Galbraith v. Bank (C. C. A. 8th Cir.), 221 Fed. 386, 392.

Appellant also attempts to found an argument upon the provision of Sec. 70 (a) of the Bankruptcy Act, to the effect that the trustee is vested with title to all property which the bankrupt could by any means have transferred prior to the filing of the petition. The argument appears to be that under the contract of March 28th, 1912, between Clark and Tomlinson-Humes, the latter could at any time transfer the title to the paintings, therefore the title passed to the trustee and this title carries with it a constructive possession. Manifestly this argument places a construction on Sec. 70 (a) which it was never intended to bear. If appellant's construction of the section is correct, we

would have this remarkable result: If A, being the owner of valuable property, gives B a power of attorney to sell and convey it for him and B becomes bankrupt, the property in question vests in the trustee of B; and further, as the act appears to provide no means for the divesting of the property once it is vested, such property would be applied to the payment of B's debts. This would be a good thing for B's creditors, but A might think he had cause to complain. The courts, however, have refused to give such a construction to Sec. 70 (a).

In the case of *In re Wright-Dana Hardware Co.*, 211 Fed. 908-912, the Circuit Court of Appeals for the Second Circuit said, referring to the provision of Sec. 70 (a) above mentioned:

> "We do not, however, understand that this clause includes, or was intended to include, property in the hands of a bankrupt bailee or of a bankrupt agent who never had the title, but who may have had a right to sell the property for the benefit of his bailor or principal. It is impossible to give the act any such construction. The bailor cannot thus be divested of his title."

That case involved certain goods which were held by the bankrupt on consignment with a power of sale, which the trustee claimed passed to him under the Bankrupt Act.

In the case of *Dunlop v. Mercer*, 156 Fed. 545-550, the Circuit Court of Appeals for the Eighth Circuit had under consideration a contract of conditional sale by which goods were consigned to the vendee to be-

come his when paid for, and by which further he was empowered to sell them, but must hold the proceeds of such sale for the vendor. At the time of the bankruptcy certain goods consigned under this agreement were still in the possession of the bankrupt, and the court allowed the vendor to reclaim them, holding that the title did not pass to the trustee, and saying:

> "A trustee is not a purchaser for value. The 'property which prior to the filing of the petition he (the bankrupt) could by any means have transferred' within the meaning of this clause of Sec. 70, is property which he could by any means have transferred to another lawfully under the same terms that he transferred it by law to the trustee; that is to say, without consideration. It does not include the property of another which the bankrupt is authorized to transfer only on the condition that he sells it for value, or sells it and holds the proceeds for the owner."

In the case of *In re Coffin,* 152 Fed. 381, the Circuit Court of Appeals for the Second Circuit decided that property held by a bankrupt in trust for other persons, though the trust is secret and not disclosed by the records, does not pass to the trustee.

In the case of *In re Atcheson,* 170 Fed. 427, this court held that trust funds in the hands of a bankrupt when coming into the possession of the trustee must be refunded to the beneficiary so far as they could be identified. The funds there involved were the proceeds of the sale of consigned goods. While the argument there presented to the court was not exactly the same

as that of appellant here, yet the decision seems to be exactly contradictory of his contention.

In connection with his discussion of Sec. 70 (a), appellant also refers to the case of *Jersey Island Packing Co.,* 138 Fed. 625, decided by this court, as if it upheld his argument on the point. But the statement there made by the court was that the bankruptcy places the "property of the bankrupt" constructively in the possession of the bankruptcy court. This is quite different from saying that the property of a third person for whom the bankrupt is agent is also constructively in the possession of the court. The other statement quoted in that case by appellant, that there was no jurisdiction over the property in any other court than the court of bankruptcy, was directed to the facts of the case from which it appeared that no other court was attempting to exercise or claiming such jurisdiction. The opinion there expressly states that "the interest of the bankrupt" in property will pass to the trustee. In the present case there was no such interest to pass.

Finally, appellant claims that at the time of the bankruptcy of Tomlinson-Humes the paintings were in their possession; that by the filing of the petition they passed into the custody of the bankruptcy court, and Clark had no right to take possession of them without an order from that court; and that, therefore, they should be returned to that court for further disposition. If we are correct in our position as to the rights of the parties under the contract between Tomlinson-Humes and Clark, this would be a most vain and fruit-

less proceeding. The trustee might have the brief satisfaction of transporting these paintings from Los Angeles to Chicago and taking a look at them, but he would have nothing more. Having neither title nor right of possession acquired from the bankrupts, and no rights derived from creditors to enforce against these paintings, the trustee would be required by the bankruptcy court to return the paintings to Clark and the situation would be as we find it now. No wonder the trial court declared this to be a moot case.

But in fact at the time of the bankruptcy these paintings were not in the possession of Tomlinson-Humes. The petition in bankruptcy was filed July 17th, 1913. The last time the bankrupt or any of its representatives had had possession of these paintings was in February or March, 1913. About that time Seymour J. Thurber, who was then in the bankrupt's employ, took the paintings to the residence of Senator William A. Clark in New York City, in an effort to sell them to Senator Clark. Senator Clark, however, declined to consider them, whereupon Thurber left the paintings in Clark's residence and went away. The paintings remained in the residence of Senator Clark until they were shipped to defendant E. P. Clark in September, 1913. Appellant claims that Senator Clark was holding these paintings for the bankrupt, but there is no evidence to that effect in the record. The testimony regarding the circumstances under which the pictures were left was furnished by the witnesses Thurber [Tr. p. 73] and Rowcroft. [Tr. p. 90.] Neither of these witnesses testified that Thurber told Senator Clark at any time that he was representing

the bankrupt. Instead of that he stated that the paintings were the property of the defendant E. P. Clark. This Rowcroft asserts positively, and Thurber does not deny it.

This was in accordance with the instruction which Humes had given Thurber. [Tr. p. 94.] Moreover it appears from a letter written by Senator Clark to Professor A. Chattain, evidently just before the pictures were shown to the senator, that he had been informed by the professor that these pictures belonged to E. P. Clark and that "Mr. Turner" had a letter of introduction from E. P. Clark, the owner. [Tr. p. 86.] Evidently the name "Mr. Turner" is a typographical or other error for Thurber. Professor Chattain was authorized to make such statement to Senator Clark by the bankrupt. [Tr. p. 93.] Evidently it was a part of the bankrupt's whole plan for selling these pictures to Senator Clark to conceal from him their connection with the matter, and simply inform him that the pictures belonged to E. P. Clark, who was already known to Senator Clark.

When Senator Clark would not buy the pictures Thurber asked if they could be left there for a little while, and Clark told him if he could arrange the matter with Rowcroft, who was in charge of the house, it would be all right. Thurber thereupon left the pictures with Rowcroft and never had them back after that, as he states himself. Thurber says that he wrote Mr. Rowcroft to deliver these pictures "on my written order only." There is no evidence, however, that such letters, if he wrote them, were ever received by Rowcroft or assented to by him. Nor does it appear that

in such letters he claimed to be representing Tomlinson-Humes. A mere holding for Thurber, under the impression that he represented E. P. Clark, would not be a holding for Tomlinson-Humes. As the agent of Tomlinson-Humes, Thurber could divest them of possession, and did so by leaving the paintings with a third party and informing him that they belonged to E. P. Clark, even though it might also be understood by such party that Thurber was the representative of E. P. Clark, and as such entitled to reclaim the paintings.

No receipt appears to have been given by Senator Clark or his employee Rowcroft for these pictures. The witness Humes says that he instructed Thurber to get a receipt for the paintings, but this instruction was issued after the paintings had been left at Senator Clark's residence, and there is no evidence that it was ever carried out. It appears, however, that Rowcroft was somewhat anxious to get rid of the paintings [Tr. p. 91]; that Bennett, who was Clark's agent in connection with these paintings, wrote to Rowcroft September 8th, 1913, asking him to ship the paintings to defendant E. P. Clark; also that E. P. Clark telegraphed to Senator Clark saying that the paintings were his and asking to have them shipped to him. In compliance with these requests from E. P. Clark and Bennett the paintings were shipped to E. P. Clark at Los Angeles, California. [Tr. pp. 87-89, 91.]

It is impossible to conclude from the evidence that Senator Clark or his employee Rowcroft ever agreed or consented to hold these pictures for the bankrupt. The pictures were simply left in their possession with

the statement that they belonged to defendant E. P. Clark, and if it could be considered that they were holding them for anybody, manifestly it must have been for E. P. Clark. This conclusion is strengthened by the fact that delivery was made on E. P. Clark's order, without any question.

The witness Thurber made a statement, which is quoted by appellant, that the pictures remained continuously in the possession of the bankrupt from March, 1912, until they were removed from the residence of Senator Clark. This statement is manifestly nothing but a conclusion of the witness, which was in fact admitted over our objection, and which is entitled to no weight. He admits that he was not with the pictures during all the period of time he referred to, and states that he knows where they were during that time because he was in touch with the affairs of the company. This shows in itself that his knowledge is only hearsay and a matter of conclusion. He further admits that he did not see the pictures in Buffalo in May, 1912. [Tr. p. 74.] In fact, the testimony of the other witnesses shows he was not in Buffalo at all. Moreover, this witness is not a disinterested person, as is claimed by appellant. He is one of the petitioners in bankruptcy against Tomlinson-Humes, from which it necessarily follows that he must be a creditor of Tomlinson-Humes and therefore very much interested in having these pictures declared to be a part of the Tomlinson-Humes estate. His bald conclusion about the possession of these paintings should not be allowed any weight against the detailed statements of other witnesses.

We have, therefore, a case where the bankrupt did not at the time of the filing of the petition against it have the actual possession of the property in question, nor did it have the constructive possession thereof, but the same was in the possession of a third party who was holding same as the property of defendant Clark. The property was therefore not in the custody of the bankruptcy court and defendant Clark was entirely justified in taking possession of it.

Even if we assume that Senator Clark were holding this property for Thurber, and that Thurber was the representative of Tomlinson-Humes in the matter, yet Tomlinson-Humes did not have the actual possession, and under such circumstances as are disclosed by the record, could have no constructive possession. A right to the possession sometimes helps to establish constructive possession, but their right to the possession was derived only from the contract of agency entered into between them and E. P. Clark on March 28th, 1912. As we have already shown, their agency and right to possession terminated by their bankruptcy. Their bankruptcy occurred when they committed the act for which they were subject to be adjudicated a bankrupt, but perhaps the revocation of their authority would not occur until some formal steps were taken to declare the bankruptcy. Such a step was taken when the petition was filed against them. Appellant claims that this petition operated as a *caveat* and injunction against all the world from dealing further with the property of the bankrupts. If it had such an effect it must also have had the effect of putting an end to their agency. Therefore, at and after the filing of the peti-

tion the bankrupt had no right to the possession and could not therefore have a constructive possession by virtue of the holding of the paintings by William A. Clark, his only knowledge on the subject being that they were the paintings of E. P. Clark.

We believe that the foregoing discussion sufficiently covers all the questions involved in this case, and that it conclusively appears that the defendant E. P. Clark is the owner of the paintings in question and entitled to their possession, and the judgment should be affirmed.

Respectfully submitted,

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HARTLEY SHAW,

Solicitors for Appellees.